NO. 21301A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

W. H. WATTENBURG and WILLIAM P. OWENS,	)
Appellants	)
v.	)
UNITED STATES OF AMERICA	)
Appellee	)

BRIEF OF APPELLANT WATTENBURG

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JURISDICTIONAL STATEMENT

This is an appeal (1R. 144)* from a judgment of conviction (1R. 141) entered by the United States District Court for the then Northern District of California, Northern Division, upon a jury verdict (1R. 29) finding appellant W. H. Wattenburg guilty of two counts of felony.

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* The notation "___R.___" refers to the record by volume and page.

All emphasis in quotations is supplied unless otherwise indicated.

Count I of the Indictment rests on the conspiracy statute, 18 USC §371. It charges that in October, 1965, appellant Wattenburg and his co-defendant, appellant Owens, conspired "to defraud the United States" and to violate the larceny statute (18 USC §641) and, specifically, to "steal" and "convert" unidentified "timber" of the United States Forest Service of a value in excess of $100. Count II of the Indictment charges appellant Owens with larceny in that "on or about October 16, 1965," and "in the Plumas National Forest" he did "steal, purloine and knowingly convert", in violation of 18 USC §641, "approximately 1,000 Red Fir (silver tip) trees belonging to the United States, the value of which trees exceeded the sum of $100". Count II also charges that appellant Wattenburg, in violation 18 USC §2, aided and abetted this alleged conduct.

Appellant Wattenburg moved for a judgment of acquital at the conclusion of the prosecution's case (3R. 560-561), at the conclusion of all the evidence (5R. 1012), and again after verdict, combining with the latter motion a motion in arrest of judgment and for a new trial. (1R. 41; 145). All these motions were denied. (3R. 582; 5R. 1024; 6R. 1367).

This Court has jurisdiction by virtue of 28 USC §1291.

STATEMENT OF THE CASE

This case has to do with trees of Christmas tree size which were cut down and removed from Sections 21 and 22,

Township 27 North, Range 11 East, MDB &M. The Indictment however, discloses none of this.* There is neither claim nor evidence that appellant Wattenburg cut or removed any tree. No one saw anyone cut or remove anything from these lands. The entire case is circumstantial and, with classic understatement, is conceded by Government counsel to be "close". (6R. 1350).

These Sections 21 and 22 are 1280 of the over 1,000,000 acres making up Plumas National Forest. They are owned by the United States, except for nine unpatented mining claims located in the approximate center of Section 22 near Palmer's Cabin. (4R. 760, 823). These claims were located by Frank Palmer in 1932 (3R. 596) and subsequently quit-claimed by him to Dr. W. H. Wattenburg, son of appellant Wattenburg. (D. Ex. K; 4R. 741).**

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* As the trial court put it (2R. 55):... I am concerned ... I do not believe that there is anything in the Indictment or anywhere else that tells we are talking about Township 27 North, Range 11 East ... This could be as far as I know, about the sale of Manhattan Island."

** Dr. Wattenburg is a member of the electrical engineering faculty at Berkeley, and a consultant to various Government space agencies. (4R. 733).

Dr. Wattenburg is also a joint tenant in four forest parcels in Section 23, immediately to the east of Section 22 and also part of the Plumas National Forest. These parcels, all in the Wilcox Valley area, were conveyed by the former owners by three separate deeds. (D. Exs. G - 1, G - 2, and G - 4).** Defendant's exhibit J, a surveyor's map of the area, depicts the properties. They consist of a 20-acre strip divided by a meadow along the northern boundary of Section 23; two 20-acre pieces along the northwest side of Section 23, the westerly boundary of each of which is the line dividing Sections 22 and 23, and another contiguous 5 acres - 65 acres in all.

In Greenville, some 30 miles by road from these forest properties, is the Hideaway Lodge (4R. 756), a motel owned by Dr. Wattenburg and his wife. (D. Ex. G-6,7; 4R. 741). Appellant Wattenburg resides at and operates the Hideaway. (3R. 595).

During the summer of 1965, Dr. Wattenburg, who has had extensive experience in the woods and with Christmas trees (4R. 736), examined his lands in Section 23 with an eye to harvesting Christmas trees. (4R. 770). He is a man trained

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** By a fourth deed (D. Ex. G-3), half of one of the parcels conveyed by D. Ex. G - 4 to four joint tenants, including Dr. Wattenburg, was conveyed by them to Dr. Wattenburg and his sister.

to think in precise terms, and had bought these parcels the year before, after careful examination, for the express purpose of cutting Christmas trees. (4R. 783). Both in 1964 and 1965 he found these parcels teeming with thousands of red fir Christmas trees. (4R. 742-744; 796-799). The density of the trees in this area is vividly illustrated by an aerial photograph (P. Ex.16) and by the fact that the surveyors, instead of simply proceeding directly down the boundaries, were required to lay traverses out into adjoining sections to establish these lines. (D. Ex. J; 4R. 827).

Satisfied that there was an abundance of merchantable Christmas trees on these Wilcox Valley properties, Dr. Wattenburg, in the summer of 1965, showed his father the areas he wished cut there if trees were to be cut that season (4R. 770, 771) and in August, 1965 gave him a power of attorney for the purpose. (D. Ex. K). This operation was conducted on behalf of Wattenburg Lumber Company, a sole proprietorship owned by Dr. Wattenburg (4R. 762, 819) from which appellant Wattenburg received a flat salary of $3,500 per year. (4R. 673, 763). His compensation depended in no way on the number or value of the trees cut, and all profits of the venture were deposited in the Logging Company bank account. (4R. 762).

On October 4, 1965, appellant Wattenburg presented himself at the office of the Sheriff of Plumas County to

obtain the transportation tags required by Cal. Penal Code §384c before one may lawfully transport Christmas trees on a public road. (2R 240). These tags are filled in by the person who loads the trees on a vehicle. (2R. 198). Prerequisite to the issuance of these tags is an application filed with the Sheriff stating, among other things, the amount and species of the trees to be transported, and the legal description of the land from which they are to be removed. Cal. Penal Code §384c.

Appellant Wattenburg wished to obtain tags for properties located in three different areas, i.e., The Hideaway,* "Round Valley" and "Wilcox Valley". (4R. 693). Each was the subject of a separate application (P. Ex. 4 A-C; 7 A-C), but all were discussed at the Sheriff's office at the same time. (5R. 871). At the property near the Hideaway and at Round Valley there were no red fir trees (4R. 632-633). As just seen, however, there were many red fir at "Wilcox Valley". The applications were written by Miss Forbes, a stenographer-matron in th Sheriff's office, based on this composite conversation. (5R.872 Appellant Wattenburg described to Miss Forbes the Section 23 properties simply by Township, Range, Section and the loose appella "Wilcox Valley" (4R. 633), intending to refer to his son's parcels there situate. (4R. 712, 713). The applications

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* Contiguous to the Lodge is a 40-acre wooded parcel. (D. Ex. G-6,7; 4R. 741).

for the Hideaway and Round Valley were accepted, but an argument broke out over the "Wilcox Valley" application, the gist of which was that appellant Wattenburg had no right to cut there and a demand for proof of ownership. (4R. 623). At this juncture, appellant Wattenburg contracted his attorney, Stanley Young, Jr., to straighten matters out. (4R. 613,659). The following morning there arrived in the Sheriff's office a letter from the title company (P. Ex. 15, 4R. 660) which, even up to the time of trial, appellant Wattenburg had never seen. (4R. 659). This letter contained only the description of 20-acre meadow parcel, i.e., the title searcher had found the deed which is D. Ex. G-1, and then had stopped the search, thereby overlooking the other deeds to "Wilcox Valley" properties. With this letter before her (5R. 876), Miss Forbes wrote up the "Wilcox Valley" application and appellant Wattenburg signed it without paying attention. (4R. 615). As thus prepared, the application covered only the 20-acre meadow parcel and provided for the transportation of 2,000 "W.F.", i.e. white fir. It is in this total confusion, arising out of argumentative conversations with a man who is hard of hearing (3R. 595),* that this case begins.

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* And see, e.g., 4R. 604, 606.

Appellant Wattenburg then entered into a written contract with Owens* under which Owens was to cut trees. (D. Ex. E; 4R. 604). He then took Owens to the Wilcox Valley area, showed him the lines not only of the 20-acre meadow parcel described in the "Wilcox Valley" application but of the other Wilcox parcels as well, a total of 65 acres. (4R. 706-707). He did not conspire with Owens to steal Government trees or suggest that Owens go get Government trees (4R. 710), and it would have been pointless and absurd for him to do so. Not only were the Wilcox Valley properties teeming with trees,** but to send Owens to cut in Section 22, where the mining claims were located, could readily jeopardize those claims. (4R. 761)***

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* Appellant Wattenburg had met Owens for the first time in early October, and had installed Owens and his large family in one of appellant Wattenburg's houses in Greenville. (4R. 708,709). This was nothing unusual; since 1945 appellant Wattenburg had supported or advanced money to 31 individuals or families in Greenville. (4R 770).

** Even after the cutting, Ranger Kennedy observed 500 red fir trees standing on the 20-acre meadow parcel, the least overgrown piece of all. (2R. 202,203).

*** The owner of a mining claim enjoys the exclusive right to possession of the surface, even against the Government, but he has no right to cut trees on the claim except as necessary to work the claim. 30 U.S.C. §26; United States v. Deasy, 24 F. 2d. 108 (D. Idaho); United States v. Etcheverry, 230 F. 2d. 193 (10 Cir.).

The actual cutting of trees was done by Owens and men working under his supervision, including Upton and Kirkpatrick. (3R. 551). Owens declined to testify. Upton and Kirkpatrick were called by the prosecution, and we discuss their testimony at pages 15 and 16-18, infra.

On November 4, 1965, Ranger Seix saw in Section 22, 75-100 "fresh cuttings" (whatever that means) of Christmas tree size trees. (2R. 59). As conceded by Government counsel, "it was never clearly resolved what a freshly cut tree was". (6R. 1342). This was the tail-end of the cutting season because Christmas and the snow were fast approaching. There had been many cutters at work in the County, for the sheriff had on file over 100 applications for transportation tags (5R. 873), and Ranger Kennedy noted such tags filed by others who were cutting "in the immediate area." (2R. 221). Seix, however, also saw appellant Wattenburg in another part of Section 22, near a caterpillar tractor and the "low boy" used to move it. (2R. 61, 63).

This tractor had been taken into the area to do the "assessment work" on the mining claims in Section 22, such work being required annually by federal law,* and appellant Wattenburg was on the property with the "low boy" to bring the tractor out of the forest (4R. 611,612).

Seix immediately reported to his superior, Kennedy (2R. 63), who immediately examined the applications for transportation tags signed by appellant Wattenburg. (2R. 179, 180). None referred to red fir, and the "Wilcox Valley" application listed only the 20-acre meadow parcel. The same day, November 4, Kennedy drove to the Hideaway and there observed a stockpile of Christmas trees containing red fir trees. (2R.185

The next day, Kennedy dispatched Seix back to the woods with two helpers to find the number of "stumps that were fresh and current". (2R. 190). The same day Seix and his helpers returned to the forest and took 10 "stump cuts",

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* 30 U.S.C. §28, Dye v. Duncan, Dieckman & Duncan Mining Co., 164 F. Supp. 747, 756.

i.e., discs from the tops of stumps. (2R. 63,64). They also searched over the one parcel described in the "Wilcox Valley" application signed by appellant Wattenburg, i.e., the 20-acre parcel divided by a meadow, counted 113 Christmas trees cut there (3R.338), and estimated that there were 500 red fir Christmas tree size trees still standing on this single parcel. (3R. 345).

The next day, Seix again returned to the forest with helpers, and they made 28 additional stump cuts. (2R. 64). For all that appears, none of the helpers had ever been in this area before November 4, and none had any basis for determining what period had elapsed since a tree had stood on any stump found, i.e., what was "freshly cut". The activities of this entire group of searchers over this two-day period were presented through the testimony of Seix only, although it is plainly composite hearsay. His testimony was that a total of 1047 trees had been cut in Sections 21 and 22, 1033 being red fir. (2R. 99).

On Monday afternoon, November 8, at 2:35 P.M. (3R. 355), Investigator Adams, a criminal investigator

employed by the U.S. Forest Service (3R. 347), went to the Hideaway Lodge "to conduct a search of the Wattenburg stockpile and to endeavor to make some matches of evidence cuts taken from Section 21 and 22 with trees in that stockpile." (3R. 354-355). He had with him "several" forest officers (3R. 356), a concededly invalid search warrant (3R. 294-295),* and the wafers taken previously by the Forest Service employees. (3R. 356). He had obtained no arrest warrant. (2R. 116). Neither Owens nor appellant Wattenburg was present, Wattenburg not arriving until 5:00 P.M. (3R. 396) and Owens not until about 6:00 P.M. (3R. 403).

The stockpile to be searched was located "immediately behind" (2R. 31) and "immediately adjacent" to the Hideaway, at a distance of 20 feet from the building. (2R. 32). It was but 5 feet from the parking area in the back of the building. (2R.227,228). As the trial court aptly put it,

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* F. Rules Crim. Proc. Rule 41 (a) requires that a search warrant issued out of a state court be issued out of a court of record. Adams' search warrant was issued by the judge of a local justice court (2R. 114,117) which is not a court of record. Cal. Const. Art. 6, Sec. I; Witkin California Procedure, Courts, §56.

the pile was in appellant Wattenburg's "backyard" (6R. 1348, 1370). Adams and his team "immediately began to search the piles" (3R. 357) and, by the time appellant Wattenburg arrived, seven matches had been made. (2R. 286). Adams also made "an eyeball survey" from which he "estimated .... that there was in the neighborhood of between two and three thousand trees in the stockpile" (3R. 387) "nearer 2500" (3R.387), "the majority" of which were red fir. (3R. 357). Nothing was counted. Adams testified that no more than 10 - 15% were "freshly cut" (3R. 411), i.e., at a maximum, 15% of 3000 or 450 were "freshly cut". (3R. 412). There is no evidence as to how many of these "freshly cut" trees were red fir.

Upon appellant Wattenburg's arrival about 5 P.M. Adams asked him questions, reduced his answers to a written statement and appellant Wattenburg signed it (3R. 396, 398, D Ex. D). The search continued until about 9 P.M. (3R. 359). Ultimately nine of the 38 wafers brought on the premises were matched (3R. 416), and the nine matching trees were seized. (3R. 415). No other trees in the stockpile were taken, and no "hold" of any kind was placed on them.* No attempt was made

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* Indeed, as Adams testified, the records of the Sheriff's office showed 1700 red fir trees "off of Mr. Wattenburg's properties" transported out of the county under transportation tags validated by peace officers. (3R. 380,381).

to match at any other operator's stockpile any of the 29 wafers which did not match any trees in the Hideaway pile. (3R. 416, 417).

After the taking of appellant Wattenburg's statement had been completed, Adams understood Owens to say: "Merv, you can't possibly make a match because I have second cut every tree in that pile" (2R. 369). To "second cut" a tree means to cut off part of its stem, thereby making it impossible to match the stem with a stump in the forest. (3R. 369). This statement was patently absurd and untrue because (a) it would be pointless to second cut anything but trees from Government land; and as the Government was missing only 1047 trees and there were some 2500 in the pile, there were some 1500 trees at the Hideaway which could not possibly have been Government trees;

(b) nine wafers matched; and (c) the prosecution's witnesses, the cutters Upton and Kirkpatrick, both testified that no trees were "second cut" until the day after Adams' visit, and then for the purpose of preserving evidence to dispute the Government's claim. Thus (3R. 515):

"BY MR. SIMONELLI:

Q. Do you know what a second cut is, Mr. Upton?

A. Yes, sir, I do.

Q. Were any of the trees you cut for Mr. Upton (sic) and Mr. Owens second cut?

A. At the Hideaway Lodge is all.

Q. When was that, sir?

A. I don't know the exact date but it was the day after Mr. Adams came up there and confiscated the pile.

Q. Confiscated the nine trees?

A. Yes.

This was fully confirmed by Kirkpatrick. (3R. 554, 555).

From each of the nine trees taken by the Forest Service from the Hideaway a wafer was cut. (3R. 359). These nine wafers were then matched with nine of the wafers supposedly taken from stumps in Sections 21 and 22 as evidence that these nine trees were Government trees. (3R. 444). In addition, a paint smudge on the stem of one of the nine trees taken from the Hideaway was "similar" to the paint on a vehicle

used by Owens and his helpers in moving trees from the woods to the Hideaway (3R. 445).

These nine Christmas trees, found by unlawful search in a pile of 2500 or more Christmas trees, were the crucial evidence in the case forming the predicate for instructions respecting the inferences to be drawn from possession of stolen property. Appellant Wattenburg moved twice to suppress this evidence. Before trial, the motion was denied without prejudice (2R. 2, 34). Renewed at trial (2R. 115), it was denied with finality. (3R. 334). Appellant Wattenburg, who had cut nothing and did not know what Owens or his helpers had actually done, was called on to explain how these nine trees got into the pile at the Hideaway. The answer to this question, which is tantamount to asking a chicken farmer to explain how a particular hen got into a vast flock, appellant Wattenburg was unable to furnish. Neither was he able to show the wide discrepancies between the prosecution's claims and the physical facts, because very shortly after the nine trees were taken from the Hideaway, it was snowing in Wilcox Valley, and until after the trial was over, the entire area was inaccessible for purposes of inspecting the ground. (3R. 384; 4R 709).

There were two eyewitnesses to the actual cutting of trees. They were Upton and Kirkpatrick, both called by the

prosecution. Upton had been interviewed by investigator Adams and had given him a written statement. (3R. 529, 530). Kirkpatrick had discussed his testimony with Adams and government counsel several times, including the night before and the morning he gave it. (3R. 557). Upton testified that Owens gave him his orders where to cut (3R. 515), but the prosecution scrupulously avoided asking what those instructions were. From this alone it would be presumed that his testimony would have been adverse to the prosecution. Yaw v. United States, 228 F. 2d 382, 383 (9 Cir. 1955). But no presumption is necessary, for on cross and redirect examination, it developed that Owens showed him the lines (3R. 521), that Upton was staying at Palmer's Cabin and coming over to Wilcox Valley to cut (3R. 520, 523), that he and his crew were actually cutting in Wilcox Valley (3R. 525), and that he actually cut 700 trees there. (3R. 518). He had, in addition, seen six "hunters" around Palmer's Cabin, "fresh stumps" 1 1/2 miles from the cabin (3R. 522), and vehicles traveling the high roads above the cabin. (3R. 523). Kirkpatrick was likewise given his orders by Owens. (3R. 549). Again, the prosecution was unwilling to ask what those orders were. On cross-examination, however, it developed that Kirkpatrick cut 300 red fir trees from the corner piece of Wilcox Meadows,

"about 30 acres". (3R. 551,552). Thus, the testimony of two persons who actually cut trees for Owens, being the Government's own witnesses, showed that their activities had been conducted on the Wilcox properties, where these cutters had every right to be.

This is the essence of the Government's case. It is supposed to lead, irresistably and beyond a reasonable doubt, to three conclusions, viz.

1. That in October, 1965, appellant Wattenburg feloniously conspired with Owens "to defraud the United States" and to "steal" and "convert" unidentified "timber" belonging to the Forest Service;

2. That "on or about October 16, 1965", "in the Plumas National Forest", Owens "stole" and "converted" "approximately 1,000 red fir ... trees belonging to the Unites States"; and

3. The appellant Wattenburg aided, abetted, counseled and commanded, etc., Owens to do so.

Merely to lay these propositions alongside the evidence demonstrates their tenuous nature. Indeed, the gossamer qualities of the supposed case against appellant

Wattenburg is best demonstrated by a fact which the trial court refused to admit in evidence (4R. 839) viz., that on December 10, 1965, one month after the investigation, the same Government lawyers who wrote the present indictment wrote and obtained another indictment which says nothing about appellant Wattenburg and nothing about any "conspiracy", but simply charges Owens alone with stealing trees. (D. Ex. M for Identification).

DISCUSSION

The judgment against appellant Wattenburg is erroneous for five main reasons:

First, neither count of the Indictment states an offense; Second, the trial court erred in denying appellant Wattenburg's motion to suppress the evidence obtained at the Hideaway by unlawful search; Third, the evidence does not support the charges made; Fourth, the trial court erred in instructing the jury; and Fifth, the trial court erred in rejecting evidence duly offered by the defense.

We discuss these points in order.

I. Count II of the Indictment Fails to State an Offense

Discussion of the two counts of the indictment in inverse order will, we believe, avoid repetition. We therefore discuss Count II first.

The rules of pleading in criminal cases and their interrelationship with the function of the grand jury have been recently reviewed and restated by the Supreme Court. Russell v. United States, 369 U.S. 749. Rather than attempt to paraphrase, we quote them:

"In a number of cases the Court has emphasized two of the protections which an indictment is intended to guarantee, reflected by two of the criteria by which the sufficiency of an indictment is to be measured. These criteria are, first, whether the indictment 'contains the elements of the offense intended to be charged, "and sufficiently apprises the defendant of what he must be prepared to meet,"' and, secondly, '"in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."'" (369 U.S. 749, 763-764)

* * *

"To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." (369 U.S. at 770).

Count II of the Indictment (1R.3) charges that Owens

"On or about October 16, 1965, in the Plumas National Forest, County of Plumas ... did steal purloin and knowingly convert approximately 1,000 Red Fir (silver tip) trees belonging to the United States, the value of which trees exceeded the sum of $100; and

W. H. Wattenburg,

defendant herein, did aid, abet, counsel,command, induce and procure the commission of the above acts."

This pleading, we submit, comes nowhere close to meeting the rules of the Russell case, and fails to state an offense because: (1) it is too vague to apprise of the charges to be met; (2) it would furnish no protection to a subsequent indictment; and (3) it seeks to charge the legally impossible, viz. larcency of real property.

A. Count II Fails to Apprise of what is to be Met

As the Court judicially knows, there are some 1,000,000 acres of forest land that satisfy the description "in the Plumas National Forest County of Plumas."* It is and was impossible to prepare to meet charges of aiding and abetting in some unspecified manner the stealing of "approximately 1000" red fir trees situated at some unspecified place or places within 1,000,000 acres of forest"on or about October 16, 1965", which term has here been construed by the trial court to mean any number of different days "near or close to October 16." (7R. 37).

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* The situation is reflected on Standard Oil Company's road map of California, depicting Plumas National Forest in green and the boundaries of Plumas County. The great bulk of this National Forest lies in Plumas County.

For reasons best known to itself, the prosecution chose to obtain an indictment couched in the broadest and most uninformative terms possible. The Government knew what trees the cutting of which it intended to attempt to prove, because the testimony is that in November, 1965, two months before the indictment, unidentified Forest Service personnel had prepared a sketch which was received in "rebuttal" and which purports to show the areas of cutting. (P. Ex. 17; 5R. 970). Appellants were thus in the position of the defendant in Lowenburg v. United States, 156 F.2d 22, 24 (10 Cir.), where the Court said:

> "The government knew this, but the accused did not know it, nor could he ascertain it from the indictment. He was completely helpless. He could only sit by and wait until the government introduced its evidence at the time of trial, and then meet it as best he could. The indictment failed to meet the minimum requirements of good pleading and was therefore legally insufficient to charge appellant with the commission of a public offense."

B. Count II Would Furnish No Protection to a Subsequent Indictment

As might be expected from an indictment in such vague terms, it is impossible to ascertain from the record what either of the appellants was convicted of under Count II. If the grand jury indicted appellant Wattenburg tomorrow for aiding and abetting Owens in the stealing of five, ten or fifty red fir trees from the Plumas National Forest, Plumas County, "on or about October 16, 1965" he would have the

benefit of the present conviction only if the record in this case shows precisely what trees Owens was convicted of stealing. But it is impossible to make this determination from the record.

First, a conviction of stealing "approximately 1000" trees is, on its face, a determination respecting an imprecise quantity and was so submitted to the jury.* Second, there is only one piece of evidence which purports to reveal, with any degree of specificity, where the "approximately 1000" trees supposedly came from. This is the sketch (P. Ex. 17) introduced in the name of "rebuttal" at the end of the trial. The scale of the sketch is one inch equals 2.5 chains, the equivalent of 165 feet. An error of 1/10 inch on the sketch is thus an error of 16 1/2 feet on the ground. The most casual inspection of the sketch shows that it would be impossible to lay out on the ground, except in the most general way, the areas marked by dashed lines and

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* The instruction was (7R. 33):
"'Approximate' or 'approximately' is defined as nearly or close to as we commonly use these words or terms... I will leave to you the application of that definition..."

denominated "Christmas Tree Cut Units". No bearings or distances from any landmark to any point on the boundary of any cutting area are shown. The lines supposedly marking the cut areas are both curved and dashed. No radii of curvature are given and the boundaries between the dashes are unspecified, although the distance between the dashes in some instances represents 40 feet on the ground. There is no evidence whatever respecting what number of the "approximately 1000" trees came from any particular area marked on the sketch as a "Christmas Tree Cut Unit."

Furthermore, as appears from the Affidavit of James F. Nicklos (1R. 105), a forester who examined the ground after the melting of the snow made it possible to do so, when this sketch is taken to and compared with the ground it purports to represent, it turns out to be in many instances either totally inaccurate and in all other instances to be only the grossest kind of approximation of the actual situation. Thus, the area shown on the sketch as a supposed cutting area out of which wafer #34 supposedly came, contains neither Christmas trees nor Christmas tree stumps.* At the

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* Wafer #34 is the wafer said to match the tree bearing the smudge of blue paint. (3R. 445).

same time, there are red fir Christmas tree stumps in Sections 21 and 22 from which the trees were removed during the 1965 cutting season but which are so far removed from any area shown on the sketch as a cutting area that they could not possibly be included in those areas. Still other such stumps, however, are in the general vicinity of the areas so depicted, but because of the crudities and inaccuracies of the sketch it is impossible to tell from the sketch whether they lie inside or outside these areas. The short of it is that the Government could institute any number of new proceedings against the appellant based on red fir Christmas trees taken in 1965 from Sections 21 and 22, and it would be impossible to ascertain whether the trees involved in the subsequent proceedings were the same as those involved in the present case. One can say here only what was said in Sutton v. United States, 157 F. 2d 661, 665 (5 Cir.) viz.,

> "The appellant has been convicted, but of what no one can say with certainty."

C. Count II Purports to Charge the Legally Impossible viz., Larceny of Real Property

18 U.S.C. §1852 makes it a misdemeanor to cut any timber on the public lands of the United States, and 18 U.S.C. §1853 makes it a misdemeanor to unlawfully cut any tree on certain lands of the United States. But neither

is the crime here charged. The charge here under Count II is felony under 18 U.S.C. §641, and to succeed in this the Government was required to plead and prove larceny. That is the crime brought into federal criminal law by this statute, the legislative history of which is reviewed at length in footnote 28 of Mr. Justice Jackson's opinion in Morissette v. United States, 342 U.S. 246, 266.

The existence of specific and specified personal property belonging to the Government and stolen by Owens was the very heart of Count II. As stated in Moore v. United States, 160 U.S. 268, 273:

> "The ordinary form of an indictment for larceny is that J.S., late of, etc., at, etc., in the county aforesaid, (specifying the property,) of the goods and chattels of one J. N. 'feloniously did steal, take, and carry away.' In other words, the whole gist of the indictment lies in the allegation that the defendant stole, took, and carried away specified goods belonging to the person named."

The "whole gist" of a violation of §641 is absent from the Indictment.

Again, in Russell v. United States, 369 U.S. 749, 768 (1962) the Court writes:

> "It has long been recognized that there is an important corollary purpose to be served by the requirement that an indictment set out 'the specific offense, coming under the general description,' with which the defendant is charged. This purpose, as defined in United States v. Cruikshank, 92 U.S. 542, 558 23 L ed 588, 593, is 'to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.'"

The Court's footnote 15, here appearing, advises that "This principle enunciated in Cruikshank retains undiminished vitality, as several recent cases attest ...." Hard on the heels of the rule quoted from Cruikshank in Russell, the Court there gave this example of the principle:

> "It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny." 92 U.S. at 558.

The charge in Count II is stealing, in a National Forest, "trees belonging to the United States." The Indictment does not state that the trees were personal property*, and in ordinary speech the words "trees belonging to the United States" in a National Forest mean trees standing in the National Forest. There was not, we submit, a single grand juror who voted for the indictment who thought otherwise. The most that can possibly be said for the indictment is that it is ambiguous and uncertain, but an indictment must "without

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* And it would be immaterial if it did, because "it is not sufficient to denominate the property 'personal goods', without describing it so as to enable the Court to decide that question for itself." People v. Williams, 35 Cal. 671-675 (1868).

any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished." United States v. Carll, 105 U.S. 611, 612, quoted with approval in Russell v. United States, 369 U. S. 749 at 765.

There can be no doubt that larceny under §641 is committable only in respect of personal property, and that trees are realty. In Lamb v. United States, 150 F.Supp. 310 (N.D. Cal. 1957), affirmed sub nom Magnolia Motor & Logging Company v. United States, 264 F. 2d 950 (9 Cir. 1959), the indictment, brought under 18 U.S.C. §641, charged that the defendants

> "between the 1st day of June, 1953, and the 30th day of December, 1954 ... did ... unlawfully steal and convert to their own use personal property of the United States, said personal property being more particularly described as follows: Approximately 10,300 fir, cedar and hemlock logs of a value of more than $100." (264 F.2d at 951.)

Judge Halbert denied a motion to dismiss, saying (150 F.Supp. at 313, 314):

> "Section 641 applies only to the stealing or conversion of personalty belonging to the United States ... It is fundamental that standing timber (This Court can see no legal distinction between growing trees and standing timber)* is classified as realty, United States v. Shoshone Tribe of Indians,

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* As we show at pages 42-46, infra, there is a distinction, but on this branch of the case, and on the case before Judge Halbert, the distinction is and was irrelevant.

> 304 U.S. 111 ... and Capoeman v. United States, D.C., 110 F.Supp. 924; hence §641 (relating to personalty) could not be applied.... With the aforementioned points of difference in mind, the Court is of the view that Congress did not intend to preclude the application of the general larceny statute, §641, where the taking of logs is involved ..."

Footnote 2 to Judge Halbert's opinion refers to another case decided by the late Judge Alger Fee. It reads as follows (150 F.Supp. at 314):

> "Defendants have called to the attention of the Court the case of United States v. Simpson, Cr. No. 17,903, in the United States District Court, for the District of Oregon, wherein the District Court there dismissed an Indictment for a violation, inter alia, of §641 charging the defendant with unlawfully, wilfully, feloniously and knowingly embezzling, stealing, purloining and converting to this own use a quantity of standing timber valued in excess of $100 located on lands owned by the United States. Defendants' contention that the ruling in the Simpson case is determinative of the issues in the case at bar is without merit for the obvious reason that the Indictment in the case at bar does not attempt to make the theft or conversion of standing timber a violation of §641, but, on the contrary, charges defendants with the theft and conversion of logs, which under ordinary nomenclature, signifies severed timber (and therefore personal property), not standing trees." (Emphasis in the original)

Defendants in Lamb were convicted, and this Court affirmed, saying (264 F.2d at 954):

> "The evidence showed that the logs were made from trees after the trees were cut and felled; that the cutting and felling of trees, the making of the logs and the theft and conversion thereof were distinct, separate and independent acts; and that therefore the logs were personal property." (Emphasis supplied)

The significance of the underscored language will soon appear. We momentarily digress, however, to this Court's decision in Chappell v. United States, 270 F.2d 274 (9 Cir. 1959)

Chappell was a Master Sergeant in the Air Force. The charge was that he violated 18 U.S.C. §641 in that he feloniously "converted to his own use" the services of an airman by making him paint Chappell's apartments when he should have been on duty for the Government. He was convicted and appealed, assigning various errors. This Court considered none of them. Instead, it reversed on a point no one had made, viz., that 18 U.S.C. § 641 could not, as a matter of law, apply. After noting that Morissette limits § 641 to "stealing, larceny and its variants and equivalents" the Court continued:

> "It is undoubtedly true that in some senses the master's right to the services of his servant may be regarded as property or as a thing of value, but the utilization of such services by a stranger has never been known to be comprehended within the definition of statutes dealing with larceny, theft, or their 'variants and equivalents.' Thus Blackstone defines larceny as follows: 'Larceny is the felonious taking and carrying away of the personal goods of another.'" (270 F.2d at 276, 277)

* * *

The question then is whether the revision of Title 18 in inserting in §641 the words 'whoever * * * converts to this use, or the use of another * * * any * * * thing of value of the United States * * *' was intended so to enlarge the original import of the revised sections...." (270 F.2d at 277)

* *

"The mere importation of the words 'convert to his own use' cannot be held to have brought about that result ...." (270 F.2d at 277)

* * *

"We cannot believe that in importing the new words 'knowingly converts' Congress meant that the subject of the conversion should be of any different type than the subject of larceny or that it could be of other than personal goods." (270 F.2d at 277)

* * *

"... the word 'convert' has a long history in the law, throughout which it has always been used in connection with interferences with goods or personal chattels." (270 F.2d at 277)

* * *

"As Congress must have known, the word 'converts' and 'conversion' really have their origin in the law of torts. The terms imply a dealing with goods or personal chattels." (270 F.2d at 277)

* * *

"It is plain that such is the ordinary sense of the word 'convert'; and that in using the words 'converts to his use' in this section, Congress did not envision any such revolutionary concept as that which underlies the attempted prosecution under Count I. We construe a section defining a crime. As such it must be strictly construed." (270 F.2d at 278).

Just as this Court found Mr. Justice Blackstone instructive in the Chappell case, supra, so is he here. After giving at Book IV, c. 17, star page 229, the definition of larceny quoted by this Court, viz., "the felonious taking and carrying away of the personal goods of another," he continues three pages later, at star pages 232-233:

> "§272. (d) Subjects of larceny. -- This felonious taking and carrying away must be of the personal goods of another; for if they are things real, or savor of the realty, larceny at the common law cannot be committed of them. Lands, tenements and hereditaments (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of things likewise that adhere to the freehold, as corn, grass, trees and the like, or lead upon a house, no larceny could be committed by the rules of the common law; but the severance of them was, and in many things is still, merely a trespass, which depended on the subtilty in the legal notions of our ancestors. These things were parcel of the real estate, and therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable. And if they were severed by violence, so as to be changed into movables, and at the same time, by one and the same continued act, carried off by the person who severed them, they could never be said to be taken from the proprietor, in this their newly acquired state of mobility (which is essential to the nature of larceny), being never, as such, in the actual or constructive possession of anyone but of him who committed the trespass. He could not in strictness be said to have taken what at the time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at one time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid, and comes again at another time, when

> they are so turned into personalty, and takes them away, it is larceny; and so it is if the owner, or anyone else, has severed them." (All emphasis in the original.)

The authorities fully support this statement. E.g., Udal v. Udal (King's Bench, 1648) Aleyn 81, 82-83, 82 Eng. Rep. 926, 927; Emmerson v. Annison (King's Bench, 1672) 1 Mod. 89, 86 Eng. Rep. 755; Lee v. Risdon (Common Pleas, 1816), 7 Taunt. 188, 129 Eng. Rep. 76, 77. It is now apparent what this Court meant in the Magnolia case when it said (264 F.2d 954):

> "The evidence showed that the logs were made from trees after the trees were cut and felled; that the cutting and felling of trees, the making of the logs and the theft and conversion thereof were distinct, separate and independent acts; and that therefore the logs were personal property."

In various States of the United States the common law rule respecting larceny of trees has been changed, in whole or in part, by statute. (E.g. N.Y. Penal Code §537, People v. Gallagher, 58 Misc. 512, 111 NYS 473, 475; Cal. Penal Code §495.) But it takes a statute to do it.* This is perfectly illustrated by People v. Williams, 35 Cal. 671, decided in 1868. The defendant, having been convicted of

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* E.g., State v. Collins, 188 S.C. 338, 199 S.E. 303 (1938); State v. Jackson, 218 N.C. 373, 11 S.E. (2d) 149 (1940); Stansbury v. Luttrell, 152 Md. 553, 137 Atl. 339, 342 (1927); Commonwealth v. Tluchak, 166 Pa. Super. 16, 70 Atl. 2d 657, 658, f/n2 (1950), all holding the common law rule still in force absent a statute changing it.

grand larceny, moved in arrest of judgment, the motion was granted and the prosecution appealed. The indictment charged that defendant

> "did unlawfully and feloniously take, steal, and carry away from the mining claim of Brush ... Company fifty two pounds of gold-bearing quartz rock, the personal goods of said Brush ... Company of the value of four hundred dollars."

The Supreme Court affirmed the arrestation of judgment (35 Cal. at 674, 675):

> "The indictment...is entirely silent as to whether the rock was a part of a ledge, and was broken off and immediately carried away by the defendant, or whether, finding it already severed, he afterwards removed it. In either case it might be true, as alleged in the indictment, that the defendant did 'steal, take, and carry away ... fifty-two pounds of gold-bearing quartz rock'; and yet, in the first event it would be only a trespass, whilst in the latter it would be a larceny, as these offenses have been defined by numerous authorities. But an indictment should be capable of no such double interpretation."

After reviewing the "subtle reasoning in respect to the difference between trespass and larceny in this class of cases", the Court concludes (35 Cal. at 676, 677):

> "We confess we do not comprehend the force of these distinctions, nor appreciate the reasoning by which they are supported. We do not perceive why a person who takes apples from a tree with a felonious intent should only be a trespasser, whereas, if he had taken them from the ground, after they had fallen, he would have been a thief; nor why the breaking from a ledge of a quantity of rich gold-bearing rock with felonious intent should only be a trespass, if the rock be immediately carried off; but if left on the ground, and taken off by the thief a few hours later, it becomes

> larceny. The more sensible rule, it appears to us, would have been, that by the act of severance the thief had converted the property into a chattel; and if he then removed it, with a felonious intent, he would be guilty of a larceny, whatever dispatch may have been employed in the removal. But we do not feel at liberty to depart from a rule so long and so firmly established by numerous decisions; and we have adverted to the question mainly for the purpose of directing the attention of the Legislature to a subject which appears to demand a remedial statute.

Four years later, in 1872, the California Legislature adopted Penal Code § 495, which reads:

> "SEVERING AND REMOVING PART OF THE REALTY DECLARED LARCENY. The provisions of this Chapter apply where the thing taken is any fixture or part of the realty, and is severed at the time of the taking, in the same manner as if the thing had been severed by another person at some previous time."

Congress has never seen fit thus to expand the crime of larceny to trees, doubtless because the forests of the Government are protected by numerous other statutes. E.g., 18 U.S.C. §1852; 18 U.S.C. §1853; 18 U.S.C. §1863. And, at this juncture, the words of Mr. Justice Jackson in Morissette v. United States, supra, repeated by this Court in Chappell, supra, are appropriate:

> "The spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything less than the incriminating components contemplated by the words used in the statute. And where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which

> it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them. (342 U.S. at 263).

II. Count I of the Indictment Fails to State an Offense

If such a thing is possible, Count I is even more vague and sweeping than Count II, and is a nullity for the same reasons. Count I charges that the appellants conspired (1R. 2):

> "to defraud the United States and to commit offenses against a law of the United States, to wit: 18 U.S.C. 641, to steal and knowingly convert to their use timber of the Forest Service of the United States Department of Agriculture of a value in excess of $100."

Despite the fundamental rule that fraud must be pleaded with particularity, there is no statement of any kind as to how the United States was "defrauded" - doubtless because the case has nothing to do with defrauding the United States. (See pages 41-42, infra). And there is no statement identifying the "timber" conspired to be stolen, either as to its nature or its location. One can thus appreciate the trial Court's statement that "this could be, as far as I know, about the sale of Manhattan Island." (2R. 55).

The word "timber" has many meanings. Although it does not embrace Christmas trees (see pages 42-47, infra), it

commonly means large standing trees usable for lumber. If this is what Count I refers to, it founders on the same shoal as the substantive crime of larceny of trees, and is analagous to a charge of conspiracy to rape one's own wife. But as stated in O'Malley v. United States, 227 F. 2d 332, 335:

> "defendants could not be convicted under 18 U.S.C. §371 for conspiracy to commit acts which for any reason did not constitute an offense against the United States."

Accord: Lubin v. United States, 313 F.2d 419, 422 (9 Cir).

"Timber" may also be construed to be some form of personal property, i.e. down trees, logs, large boards, etc. And thus the charge is conspiracy to steal some wholly undefined property, real or personal, which may be located anywhere. We are in the realm of pure speculation, and to hold such an Indictment good would render the Fifth Amendment's provision respecting indictment by grand jury meaningless.

III. The Trial Court Erred in Denying the Motion to Suppress Evidence

As previously noted (supra, p. 16), appellant Wattenburg moved not once but twice to suppress the evidence that was the core of the prosecution's case viz., the wafers taken from the nine trees seized, after a 6 1/2 hour search, from the pile of trees in the back yard of the Hideaway.

The crucial nature of this evidence is best illustrated by the impact it had on the trial judge. Thus:

> "The Court: How does he explain the nine matches in his backyard?" (6R. 1348)
>
> "The Court: ... you can't explain those nine trees in Mr. Wattenburg's backyard ..." (6R. 1370).

It was fundamental error for the trial judge to refuse to suppress this evidence.

We may immediately put aside as irrelevant cases dealing with searches conducted pursuant to a validly issued warrant, with searches made incident to a valid arrest, and with those involving the search of automobiles. The purported warrant was concededly invalid(p. 12, supra), no one was arrested before, during or after the search, and the thing searched was a large pile of Christmas trees which obviously could not be quickly spirited away. Smith v. United States 335 F. 2d 270, 273 (D.C. Cir.). Also irrelevant are cases where the officer, merely by using his eyesight, immediately identifies an object as contraband, i.e., cases in which there is no search at all, because the thing to be taken is plainly visible. Here the whole purpose of Adams going with his men to the Hideaway was to search through the pile to ascertain whether they could find any evidence, and it took many hours to do so.

The prosecution's claim below was that the protection of the Fourth Amendment does not extend to the land

surrounding a house, such land being subject to search without a warrant by virtue of the "open field" doctrine. There is undoubtedly dicta to this effect in old cases. E.g., Feldman v. United States, 104 F.2d 255, 256 (3 Cir. 1939). But if this ever was the law it is not today.

We are not here dealing with a still located 1/4 mile or 250 yards from a house. Cf. Koth v. United States 16 F. 2d 59 (9 Cir. 1926). United States v. Hassell, 336 F.2d 684 (6 Cir. 1964). Here, the pile of trees was immediately adjacent to appellant Wattenburg's residence, and the land was so close to the house as to warrant the trial court's appellation "back yard." The Fourth Amendment applies to an automobile parked in a farmyard close to the farm house (Kroska v. United States, 51 F.2d 330, 333 (8 Cir. 1931), to a barn 70-80 yards from a house (Walker v. United States, 225 F.2d 447 (5 Cir. 1955)), to a smoke-house 75 feet from a residence (United States v. Mullin, 329 F.2d 295 (4 Cir. 1963)) and, of course, to a back yard. Hobson v. United States, 226 F.2d 890, 894 (8 Cir. 1955).

The prosecution's position was that it might have its cake and eat it too. It early claimed that because of the presence of the nine trees seized from the stockpile, appellant Wattenburg was in possession of stolen property, raising a

presumption of guilt (3R. 574). The prosecution then sought (5R. 1064) and the Court gave (7R. 40) instructions permitting conviction on the basis of inferences to be drawn from the possession of stolen property. Then, from the other side of its mouth, and to avoid the suppression of the nine trees, the prosecution implied that these trees were remote from appellant Wattenburg because supposedly in an "open field". If an object is sufficiently in a citizen's possession to raise presumptions of felony against him, it is, we submit, sufficiently in his possession to require a search for it to be conducted pursuant to a valid warrant or a valid arrest.

IV. The Evidence Does Not Support The Conviction on Count I.

Even if it be assumed that Count I states an offense and that the motions to suppress were properly denied, the conviction on Count I must be reversed because it is not supported by the evidence.

Count I charges a conspiracy "to defraud the United States" and "to steal and knowingly convert timber of the Forest Service". The evidence will not support either claim.

A. The Evidence Shows no Conspiracy to Defraud the United States.

This case has nothing whatever to do with defrauding the United States, as the trial court recognized when, with the

agreement of all parties, it struck from Count I the language "to defraud the United States and" (5R. 1049,1050). To conspire to defraud the United States means primarily "to cheat the Government out of property or money," or to defeat its official action "by misrepresentation, chicane or the overreaching of those charged with carrying out the governmental intention". Hammerschmidt v. United States, 265 U.S. 182, 188.

There is no evidence that either defendant had any communication of any kind with any representative of the Government until Adams and his helpers had been searching for hours at the Hideaway for trees the Government had already lost. There is no evidence of any agreement to make any representation, for or otherwise, to any agent of the Government. As stated in the Hammerschmidt case, "one would not class robbery or burglary among frauds." (265 U.S. at 188). Neither would one so classify cutting trees on Government land.

B. The Evidence Shows No Conspiracy to Steal Timber.

Just as this case has nothing to do with defrauding the United States, it has nothing to do with "timber". This case has to do with Christmas trees, and such trees are not timber.

As appears from pages 34-36 of Volume XI of the Oxford English Dictionary (1R. 87-89), the word "timber"

derives from words of ancient languages which either directly meant or suggested building.*

The meanings of "timber" given by the O.E.D. demonstrate that the word does not mean any and all trees in general, but only certain good-size trees which can be used for building.

And so it is in law. A recent text is Falk, "Timber and Forest Product Law" (1958). The preface advises that

> "Three principal sources were used to gather and check the material in this book: (1) Foresters, (2) attorneys, and (3) every reported American decision involving timber--several thousand cases."

His preface also notes that

> "Particular credit must also go to the United States Forest Service office in Washington, D.C. ..."

At page 71 of his book, Falk states the law as follows:

> "'Timber' alone has been defined as wood proper for building and the manufacture of other useful items. It does not include saplings, brush, fruit trees, or trees suitable only for firewood or decoration."

At page 74, he notes that "Specific questions usually arise in trying to determine the meaning of the word 'timber',

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* Thus the Greek "dem-ein", to build; the Latin "domus", house; the Indo-European "demro", from the ablaut series "dem", "dom", "dm", to build; the Gothis "timr", itself the root of the Gothis "timr-jan", to build, and "timr-ja", a builder.

i.e., ... Does it include ... (d) firewood, brush, Christmas trees?" This question he answers on the following page, as follows:

> "(d) Does it include firewood, brush and Christmas trees? There has been previously discussed in detail the fact that these items are not generally considered as being timber, and therefore would not be included. Neither would fruit trees, except whether they were to be used for making furniture or the like."

The cases support Falk completely. Thus, Arbogast v. Pilot Rock Lumber Co. (1959), 215 Ore. 579, 336 P.2d 329, 332:

> "In the absence of modifying terms or expressions in the instrument or a construction peculiar to the locality, the general rule within the lumber industry is that the word 'timber' denotes trees of a size suitable for manufacture into lumber for use in building and allied purposes. It does not, however, include saplings, brush, fruit trees or trees suitable only for firewood or decoration. [Many citations]"

Accord: Union Bag & Paper Corporation v. Mitchell, 177 F. 2d 909, 912 (5 Cir., 1949); United States v. Schuler (C.C. Mich. 1853), 27 Fed. Cas. No. 16,234; Buffum v. Texaco, Inc., 241 C.A. 2d 732,735 (1966).

One might speculate that the U.S. Forest Service uses the word "timber" in some peculiar and artificial way. But this is not so, as the Regulations dealing with Forest Service "timber" make plain. These are contained in Part 221 of Title 36 of the Code of Federal Regulations. By way of example, Reg. 221.2 provides that

> "Each sale or other use of national forest timber will be authorized only after the approving officer is satisfied that practicable fire-prevention measures and methods of cutting and logging are prescribed which will preserve the residual living and growing timber, promote the younger growth...etc."

To speak of "logging" Christmas trees is nonsense. Again Reg. 221.3(c) says:

> "Timber cut from the national forests in Alaska may not be exported from Alaska in the form of logs, cordwood, bolts, or other similar products necessitating primary manufacture elsewhere without prior consent of the Regional Forester..."

To speak of "manufacturing" operations to be performed on Christmas trees is absurd. Again, Reg. 221.4(b) authorizes the Chief of the Forest Service, in the interest of maintaining "stable communities", to

> "offer national forest timber for sale to responsible operators...who will manufacture the timber to at least a stated degree within the community or communities to be maintained."

Again, Reg. 221.6(b) provides that

> "The Chief, Forest Service, is authorized to make timber sales for any amount on any national forest... He may delegate and provide for redelegation of this authority to subordinates for amounts not exceeding in any one sale, 50 million feet board measure, or the equivalent thereof."

It is fantasy to speak of Christmas trees in terms of board feet. As Ranger Kennedy testified, Christmas trees are measured and priced in terms of lineal feet (2R. 221).

Both the Congress and the Forest Service know that everything in the forest is not "timber". Thus, 16 U.S.C. §471, the basic authority for setting aside national forests, speaks of "public lands wholly or in part covered with timber or undergrowth". 16 U.S.C. §476 speaks in terms of "timber and cordwood and other forest products". Again, 16 U.S.C. § 491 speaks of "timber and other forest products", and 16 U.S.C. §493 permits the Secretary of Agriculture to furnish "young trees" free to certain persons. The following question by Government counsel and answer by Ranger Kennedy sum the matter up (2R. 203,204):

> "Q. Now, as a Timber Management Officer, Mr. Kennedy, do you have occasion to act as a Government representative in the sale of timber and other vegetative growth in this area?
>
> "A. Yes."

We submit that, as a matter of law, Christmas trees are not "timber", and that there is no evidence of a conspiracy to steal timber.

V. The Evidence Does Not Support the Conviction on Count II.

Appellant Wattenburg was charged in Count II as an aider and abettor. He could not therefore, be convicted under this count unless the crime which he was charged with abetting was actually committed. Karrell v. United States, 181 F.2d 981, 985 (9Cir. 1950).

The crime allegedly aided and abetted supposedly took place "in the Plumas National Forest". We allude to this fact because the prosecution, pointing to the averment of "conversion," made much of the storing of trees at the Hideaway, and sales of trees there made. These acts however, obviously took place after whatever was done in the Forest, and therefore could not constitute aiding or abetting. Rizzo v. United States, 275 Fed. 51 (3 Cir. 1921); Johnson v. United States, 195 F.2d. 673,675 (8 Cir. 1952).

The crime allegedly committed by Owens was stealing "1000...trees belonging to the United States, the value of which trees exceeded the sum of $100." If this Count charges any violation of 18 U.S.C. §641 whatever, to prove it requires evidence of the taking, at one time, of personal property of the value of $100. Value is an essential element (Stevens v. United States, 297 F.2d. 664 (10 Cir. 1961); Ransom v. United States, 337 F. 2d. 550 (D.C. Cir. 1964)), because unless the value of the thing taken is $100, the crime is not felony. 18 U.S.C. §§1,641. But there is no evidence of either of these facts.

A. There is no Evidence of a Taking of Personal Property

There is no evidence as to the mechanics by which any trees were removed from the Government's land. A Christmas tree is readily portable. There is no evidence that the trees were

cut and then left to lie on the land - and thus become the Government's personal property. To cut trees and not immediately remove them would obviously increase the risk of apprenension. Indeed the prosecution's theory was that cutting had been done close to roads (6R. 1304), thus facilitating speedy ingress and egress. Whether there was any personal property in the possession of the Government lies in the realm of pure speculation, and no one could find, must less find beyond a reasonable doubt, that such property existed.

B. There is no Evidence of the Taking, in a Single Larceny, of $100 Worth of Trees

If it be assumed that trees were cut and left to lie so as to become the subject of larceny, there is no evidence that $100 worth of trees were taken in a single larceny.

According to the Government's valuation witness, Ranger Kennedy, the value of the missing trees was 75 cents per lineal foot. (2R. 221). It is thus obvious that no single tree - indeed no ten trees together - could be worth $100. In the nature of things, trees had to be moved out of the forest by hand to vehicles, and no one could possibly carry $100 worth of Christmas trees at once. The crime of larceny, however, is committed and completed by "the least removing of the thing taken from the place it was before with intent to steal it." Rutkowski v. United States, 149 F. 2d. 481, 483 (6 Cir. 1945). These trees had to have been taken a few at a time, and in amounts worth less than $100. To arrive at a value of

$100, small amounts must be aggregated, and this is impermissible. Cartwright v. United States, 146 F. 2d 133 (5 Cir. 1944).

There is evidence that there were nine Government trees in the stockpile at the Hideaway. There is also evidence that there were, at a maximum, 450 "freshly cut" trees in the stockpile, made up of unspecified numbers of red and white fir. But no one could find from the evidence beyond a reasonable doubt, or indeed at all, that Owens, in a single larcency, stole 1000 Government red fir trees, or even $100 worth of Government red fir trees.

VI. The Trial Court Erred In Instructing the Jury

1. The Giving of the Instruction Respecting Defrauding the United States

This case so obviously had nothing to do with defrauding the United States that, during the instruction conference, it was agreed that the words "to defraud the United States" should be stricken from the Indictment. (5R. 1049, 1050). Subsequently, and to avoid the problem of Carney v. United States, 163 F. 2d 784 (9 Cir.), this language was restored to the Indictment. The Court then, in instructing the jury, read Count I of the Indictment in its original form (7R. 17), and gave the following instruction (7R. 19, 20):

> "You will recall that the indictment alleges two possible objects of the conspiracy. Before you would be entitled to return a verdict of guilty on Count One, you must find that at least one of these purposes was contemplated by the conspirators.

> The first purpose alleged is 'to defraud the United States.' In this regard, you are instructed that a transaction or course of conduct is designed to defraud the United States if it is done with the intent to deceive an agency or department of the Government. Whether or not a Government agency was actually deceived, or suffered monetary loss, is immaterial."

This charge is both erroneous and completely unsupported by the evidence. It was highly prejudicial, and was duly excepted to. (6R. 1326-1327).

Under this instruction, a conspiracy to defraud the United States may be found upon any act done "with intent to deceive an agency or department of the Government," even though the Government has neither taken nor been asked to take any action of any kind, or awarded or been asked to award any right, privilege or status on the basis of any communication, representation or act on the part of any alleged conspirator, and has never relied on anything said or done by anyone. This instruction totally eliminated, from the crime of conspiracy to defraud, the concept of defrauding.

The evidence in this case respecting conspiracy was extremely nebulous. This "defrauding" instruction followed hard on the heels of a summation by counsel for the prosecution in which characterizations of "deceit" (6R. 1257) and "deception" (6R. 1264) were applied to transactions having nothing to do with the Government. Under this instruction, the jury was permitted to convict on a theory which was both erroneous and

had no support in the evidence.

Appellant Wattenburg proposed an instruction to take this question out of the case. (5R. 1113). It was not given, and the trial court declined to hear any objections to instructions not given. (6R. 1323).

2. The Refusal of Appellant Wattenburg's Proposed Instruction 13

This proposed instruction (8 Tr.) reads as follows:

> "Charges of conspiracy cannot be made out by piling inference upon inference, for to do so would fashion a dragnet to draw in all substantive crimes."

This is a direct quotation from Direct Sales Co. v. United States, 319 U.S. 703, 711, cited at the foot of the instruction. This instruction was not given and, as just noted, the trial court declined to hear any objections respecting instructions refused. (6R. 1323).

A conspiracy case like this one, based purely on circumstantial evidence, is one fraught with peril for any defendant, no matter how innocent, for in such a case anything proves anything. As Mr. Justice Jackson so well put it, "the modern crime of conspiracy is so vague that it almost defies definition", and is "a scatter-gun to bring down the defendant." Krulewitch v. United States, 336 U.S. 440, 446, 452. In such a case, we submit, the defendant is entitled to have the jury cautioned by the type of instruction proposed.

VII. The Trial Court Erred in Refusing to Admit the Prior Indictment

On December 10, 1965, over one month after the investigation and search at the Hideaway, the same Government counsel who obtained the Indictment underlying the present proceeding prepared and obtained another indictment. (D. Ex. M for identification). This prior indictment says nothing of appellant Wattenburg and nothing of any "conspiracy", but simply charges Owens with stealing trees.

The trial court refused to receive this prior indictment in evidence. (4R. 839). This document is a formal statement, by the officers of the Government in charge of the matter, that long after the facts were known to them they had insufficient basis to believe that appellant Wattenburg conspired with Owens or participated in any other manner in his alleged wrongdoing. The jury, we submit, was entitled to have this evidence before them in considering whether, as the prosecution later contended, the evidence compelled the conclusion that appellant Wattenburg was guilty of felonies committed with Owens.

CONCLUSION

We respectfully submit that the judgment of conviction of appellant Wattenburg should be reversed, with directions to dismiss the Indictment.

Dated: March 24, 1967.

Stanley C. Young, Jr.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Richard Haas

Richard Haas